Alternatives to Going to Court

Alternatives Basics

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Alternatives to Going to Court Basics

You are in a dispute. But that does not necessarily mean that you have to go to a court.

Going to court is not fun. Going to court is risky, expensive, stressful, and time consuming. Sometimes going to court is necessary, but often it can be avoided.

Some common alternatives to going to court:

- Negotiation
- Mediation
- Neutral evaluation
- Arbitration

These techniques are sometimes called “Alternative Dispute Resolution” or “ADR”.

Key Terms

Alternative Dispute Resolution, often called “ADR” for short, refers to the different processes available to resolve disputes outside of court. Often ADR is more affordable, less stressful, and quicker than going to a traditional trial.

Advantages of Avoiding Court

Settling a dispute without Court has many advantages:

- **Flexible:** The process can be designed to suit the dispute
- **Effective:** Voluntary agreements may be more likely to be complied with than orders imposed by the Court
- **Faster:** Reaching an agreement can resolve the problem more quickly
- **Cheaper:** Court is expensive. Even if you do not use a lawyer, going to court will take a huge amount of time. You may also have to pay some large expenses. You may need to hire an expert to prove your case. Avoiding court could mean avoiding a huge bill
- **Secret:** The settlement process can usually be kept confidential. Court on the other hand is usually open to the public and the media
- **Less mental and emotional toll:** Going to Court can be mentally and emotionally difficult, especially when it is unfamiliar
- **No finding or admission of liability:** Making an offer to settle or agreeing to a settlement does not mean that you are admitting liability in the lawsuit. It simply means that you would like to resolve the lawsuit before it goes to trial
- **Under your control:** You can choose how you resolve the dispute. You can also choose who you use to assist in resolving the dispute
- **Open to compromise:** Court can be “winner take all”. Negotiation and mediation can allow for give and take on both sides
- **Easier to remain friends:** It is often easier to leave mediation or negotiation as friends than it is to be friendly after a court battle
- **Avoid “Costs” awards:** Under the Supreme Court Rules, the party who is unsuccessful in a lawsuit is generally ordered to pay the other party’s costs. Although costs only cover a portion of the total expenses that someone must

pay to take a case to court or defend a case, they can still be very significant (See **Costs**)

Lawyers Can Help

Getting advice from a lawyer about your case can help you figure out what would be a reasonable settlement of your claim. A lawyer may also be able to help you negotiate a settlement. If you can reach an agreement to settle the case, make sure that your settlement is documented so that it ends the dispute. A lawyer can give you advice on how to properly document a settlement so that the settlement agreement cannot be later questioned and reopened. For more information on hiring a lawyer, see **Get Help**.

Deadlines for Starting Court Proceedings

While considering alternatives to going to Court, you must keep in mind deadlines for starting court proceedings. These are also known as limitation periods. Most court cases can only be brought within a certain time period. For more information on limitation periods, see **Limitation Periods.**

If you are unsure about when your deadline to start a Court process ends, it is important to seek legal advice as quickly as possible. A limitation period could expire even while you are in the process of trying to negotiate an out of court settlement.

One way to protect yourself is to file a court action just to make sure you do not run out of time. You do not necessarily have to move forward with the Court process, but you will be able to negotiate without worry that you will lose your ability to go to Court if negotiation fails.

Negotiation

To negotiate is to discuss a problem in order to try and reach an agreement. Negotiation can be the simplest and cheapest method of dispute resolution.

Negotiation can be done on your own, with the help of a lawyer, or with the help of another support person.

Negotiation can be an ongoing process. You can try to negotiate a settlement to a dispute at any time.

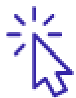
Negotiation can have serious consequences. Negotiation can lead to legally binding contracts. It is therefore important to be prepared.

Learn More

Early Resolution from AdminLawBC.ca

One way to be prepared is to talk to a professional before you enter negotiations. A lawyer can give you advice on the likely outcome of a dispute if it went to trial. Lawyers are also experienced negotiators, and can give you tips on strategies. For more information on getting legal help, see **Get Help.**

Conflict coaches are another resource to consider. A conflict coach is a professional trained in dealing with difficult situations. They may help you better understand the conflict, develop strategies to handle the conflict, prepare you for difficult conversations, and increase your confidence.



Learn More

More can be found about conflict coaching at **Mediate BC**.

When entering into negotiations, make clear that the discussions are "Without Prejudice". This means that what is said in a negotiation cannot subsequently be used against you in Court to hurt your case. This encourages parties to discuss the matter freely, including even possibly acknowledging weaknesses in their position.

Some key negotiation principles include:

- **Recognize the possibilities:** Think about what might happen if you do not settle the dispute. What would be the best result if you go to Court? What would be the worst result if you go to Court? Often it is possible that if the matter goes to court that both complete success and complete failure are possibilities. Be realistic about how bad the dispute could become if a solution is not found

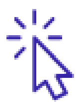
- **Think of your options and interests:** Before settling on an agreement try to think creatively about as many possible solutions to the problem as possible. You may want to seek professional advice, or talk to trusted friends or family about the dispute and possible solutions

- **Focus on the problem, not the people:** Separate the people from the problem. Be critical of the subject matter of the dispute, not of the person with whom you are in a dispute. Personal attacks rarely lead to agreement

- **Look for "win-wins":** Sometimes people in a dispute can both get what they want. Engaging in "interest based negotiations" means to look for solutions where both sides can have their "interests" addressed – that is, there can be a "win-win". This is often a more effective approach than "position based" negotiations, where a gain for one is seen as a loss for the other side. For example, if there is one lemon that two people want, a "position based" approach would say that if one person gets the lemon, the other will be disappointed. However, an "interest based" approach would ask why each wanted the lemon. If one wanted the rind for a zest and the other wanted the juice, there could be a "win-win"

There are many more resources that may provide helpful tips with negotiation practice. The libraries have many books on negotiation, and information about negotiation strategies may be found on the internet.

Learn More



The **Dispute Resolution Reference Guide** from the Department of Justice Canada is a helpful resource on negotiation and dispute resolution.

Third Party Help

If you need some more help to come to a resolution, there are options to hire a neutral third party.

Mediation

Mediation is an assisted negotiation. The parties in mediation negotiate their own resolution to the dispute with the help of the mediator, who is trained in conflict management. A mediator does not decide the matter for the parties. Rather, a mediator helps parties negotiate their own agreement more effectively by:

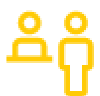
- Establishing the ground rules for the discussion
- Helping parties identify common ground
- Avoiding irrelevant or unproductive discussions
- Keeping the parties focused on the issues
- Moving the parties from fixed positions
- Helping the parties to listen to each other and to understand the other's perspective
- Dealing with power imbalances
- Helping the parties find a resolution that meets their interests

When cases go to trial or arbitration, usually one person wins and one person loses. In mediation, however, the goal is to find a solution that best meets the needs of everyone involved.

Mediation is usually kept confidential. However, this does not follow automatically simply by entering into mediation. Rather, it is up to the parties to determine limits on sharing information as to what was said in mediation. If it is important that the mediation remain confidential you should seek a written agreement requiring confidentiality.

If a settlement is reached at mediation it is put in writing and becomes a binding contract.

The BC Mediator Roster Society operates a mediation consultation program, which is designed to help answer your questions about the process. The mediator will help you decide if mediation is suitable to resolve your dispute and answer all your questions about the process, including how much it will likely cost.



Get Help

You can find out more information on **MediateBC.com**.

Neutral Evaluation

A neutral evaluation is a process in which parties obtain a non-binding, independent evaluation of their case from a neutral third party, jointly selected by the parties. Depending on the nature of the dispute, the neutral third party could be an expert in a certain field, a lawyer experienced in the type of case, or a retired judge. The evaluation could also be made by a panel of two or three persons.

The opinion or assessment of a neutral legal professional is often persuasive enough to convince the parties to adopt it as their settlement. You may want to talk to a lawyer about this process, and find out how you can find the right person to give you an unbiased opinion about your case.

A neutral evaluation can be seen as lying between mediation and arbitration. Unlike mediation, a neutral evaluator will express an opinion on the merits of the case. However, unlike an arbitrator (or a judge), that opinion will not bind the parties.

Arbitration

When a dispute is submitted to arbitration, the arbitrator:

- Considers and assesses the evidence presented to them by the parties
- May call their own witnesses and retain experts
- Cannot exclude evidence that a court would otherwise admit
- Orders an award based on the evidence presented that is legally binding on all parties

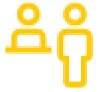
Arbitration is generally a private, voluntary method of adjudication; however, the government sometimes requires that certain disputes be submitted to arbitration (e.g., landlord and tenant disputes under the ***Residential Tenancy Act***). Contracts sometimes require that disputes about the contract will be resolved by arbitration rather than litigation.

One advantage of arbitration over litigation is that the parties can choose their decision-maker. Normally the award of an arbitrator is final and binding – and is enforceable as an order of the court.

As you move from negotiation (where you negotiate a resolution to your dispute on your own), to mediation (where the mediator assists the parties in reaching a

resolution), to arbitration (where the arbitrator makes a binding decision), the process becomes more formal, complicated, and more like litigation in court. For that reason, arbitration is generally more expensive than mediation, which is generally more expensive than negotiation.

Get Help



Alternative Dispute Resolution Institute of BC can provide you with more information about dispute resolution services, and can provide you with a list of qualified arbitrators (and mediators).